CASE NO. 08-311

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
NOV 28 2008
OFFICE OF THE CLERK

KELVIN DEWAYNE ALTHEIMER,
PETITIONER

Vs.

SETON CORPORATION d/b/a BAPTIST HOSPITAL,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
DENIED NOV 10, 2008
ON OPINIONS FROM U.S. DISTRICT COURT,
THE CIRCUIT COURT,
AND
THE U.S. APPEALS COURT FOR SIXTH CIRCUIT.

PETITION FOR REHEARING

TO THE UNITED STATE COURT OF APPEAL
FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

KELVIN D. ALTHEIMER
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PETITIONER

QUESTION PRESENTED;

1) IF A FEDERAL RULE EXISTS, IT SHOULD APPLY, AND THERE IS NO JUSTIFICATION FOR APPLYING STATE LAW. WILSON Vs. GARCIA, 491 U.S. 261, 267 (1985).

BEST AVAILABLE COPY

CASE NO. 08-311

FACTUAL BACKGROUND

TO THE HONOR OF THE COURT, BRIEFLY AND DISTINCTLY. PETITIONER ALTHEIMER STARTED THIS CIVIL ACTION IN FORMA-PAUPERIS AND WITH HELP OF MY HIGHER POWER I CONTINUE IN FORMA PAUPERIS AND INDIGENT, ALLOW BY EVERY COURT.

THIS CIVIL ACTION STARTED IN THE U.S. DISTRICT COURT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE DIVISION ON PREVIOUS CASE NO. 3-05-0188 AND DISMISSED MARCH 10,2005 FOR LACK OF SUBJECT MATTER JURISDICTION AND WHICH CIVIL RIGHT DISCRIMINATION WERE VIOLATED BY U.S. DISTRICT JUDGE TODD CAMPBELL. REGULATION OF DISCOVERY IS VERY MUCH THE DISTRICT COURT's PROVINCE AND THE DENIAL OF AN EXTENSION TEST ONLY FOR ABUSE OF DISCRETION-U.S. Vs. SAYER, 450 F 3d 82.

NOW! WHAT HAPPEN WAS A UNFAIR SITUATION IN THE STATE COURT OF TENNESSEE, DAVIDSON COUNTY; CASE # 05C-1084 CIVIL ACTION; THE CONFLICT OF TWO DIFFERENT JUDGESES OPINIONS, IN THE CIRCUIT COURT FOR THE STATE OF TENNESSEE, DAVIDSON COUNTY. ON JUNE 13,2005 A SIGNED ORDER BY 5th CIRCUIT COURT JUDGE WALTER KURTZ, GRANTING THE ORDER IN PART AND DENIED IN PART. DEFENDANT'S MOTION IS DENIED IN REFERENCE TO PLAINTIFF'S BATTERY AND FALSE IMPRISONMENT/FALSE ARREST CLAIMS.

NOW! ANOTHER ORDER SIGNED BY PROBATE JUDGE DAVID RANDALL KENNEDY,SR OF THE 7th CIRCUIT COURT SIGNING A FINAL JUDGMENT ON AUG 1, 2005; STATING ORDERED, ADJUDGED,

AND DECREED THAT PLAINTIFF'S CLAIMS AGAINST DEFENDANT, SETON CORPORATION d/b/a BAPTIST HOSPITAL, ARE HEREBY DIMISSED IN THEIR ENTIRTY, WITH PREJUDICE, AND A FINAL JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT.

CASE NO. 3-06-0334
THE U.S. DISTRICT COURT MIDDLE DISTICT
OF TENNESSEE NASHVILLE DIVISION;

ALTHEIMER FILED A CIVIL RIGHT DISCRIMINATION CLAIM IN DISTICT COURT MARCH 5, 2005; CASE NO. 3-05-0188 WHICH WAS DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION/WHICH CIVIL RIGHT VIOLATED ON MARCH 10, 2005 BY U.S. DISTRICT JUDGE TODD CAMPBELL. AFTERWARD CAME BACK WITH SUBJECT MATTER JURISDICTION/ACTION BROUGHT UNDER RACIAL DISCRIMINATION 1981, 1982, and 1983, SUBMITTED APRIL 5, 2006; ATTACHED WITH THE DEFENDANT'S WITNESS LIST, (CREDIBILITY EVIDENCE) CASE NO. 3-06-0334.

THE RESTAEMENT (SECOND) OF JUDGMENTS STATES THAT A JUDGMENT WILL BECOME EFFECTIVE FOR PRECLUSION PURPOSES ON THE DATE OF ITS "RENDITION." HOWEVER, A FEDERAL JUDGMENT IS EFFECTIVE ONLY AFTER IT HAS BEEN SET FORTH IN A SEPARATE DOCUMENT AND ENTERED INTO THE CIVIL DOCKET BY THE CLERK. SEE RESTATEMENT (SECOND) OF JUDGMENTS 14 (1982), FED. R. CIV. P. 58, 79(A).

THE CLAIM WAS HIT WITH A COLLATERAL ATTACK. THE BLACK'S LAW DICTIONARY (8th Ed. 2004) 278 DEFINES "COLLATERAL ATTACK" AS AN ATTACK ON A JUDGMENT IN A PROCEEDING OTHER THAN A DIRECT APPEAL: ESP., AN ATTEMPT TO UNDERMINE A JUDGMENT THROUGH A JUDICIAL PROCEEDING IN WHICH THE GROUND OF THE PROCEEDING (or) (A DEFENSE IN THE PROCEEDING) IS THAT THE JUDGMENT IS INEFFECTIVE.

ALSO IN GENERAL, A COLLATERAL ATTACK ON A JUDGMENT IS ACTUALLY AN ATTACK ON THE INTEGRITY OF THE JUDGMENT. THE

MERITS OF THE PREVIOUS JUDGMENT ARE NOT AT ISSUE IN SUCH A SITUATION ONLY THE FUNDAMENTAL VALIDITY OF THE PREVIOUS JUDGMENT IS AT ISSUE. CONSEQUENTLY, THE COLLATERAL-ATTACK DOCTRINE CONTAINS ELEMENTS OF THE SAME CONSIDERATION THAT COME INTO PLAY WHEN CONSIDERING WHETHER A PARTICULAR JUDGMENT IS VOID OR VOIDABLE. SEE PRATTS, 102 OHIO ST. 3d 81, 2004-OHIO-1980, 806 N.E.2d 992,10-12. BUT IN THE ABSENCE OF THOSE FUNDAMENTAL DEFICIENCIES, A JUDGMENT IS CONSIDERED "VALID" (EVEN IF IT MIGHT PERHAPS HAVE BEEN FLAWED IN ITS RESOLUTION OF THE MERITS OF THE CASE) AND IS GENERALLY NOT SUBJECT TO COLLATERAL ATTACK.

WHETHER AN AMENDED COMPLAINT RELATES BACK TO THE FILING OF THE ORIGINAL COMPLAINT IS GOVERNED BY RULE 15(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE. THIS RULE WAS SUBSTANTIALLY REVISED IN 1991. PRIOR TO THE 1991 AMENDMENTS, THE SUPREME COURT, IN SCHIAVONE Vs. FORTUNE, 477 U.S. 21 (1986), RULED THAT RULE 15(C) REQUIRED THE SATISFACTION OF THREE CONDITIONS FOR AN AMENDED COMPLAINT NAMING A NEW DEFENDANT TO RELATE BACK TO THE FILING OF THE ORIGINAL COMPLAINT;

THE CIRCUIT COURT FOR THE STATE OF TENNESSEE
DAVIDSON COUNTY CASE NO. 05C-1084

THE DISMISSED CLAIM FROM DISTRICT FEDERAL COURT WAS THEN BROUGHT TO THE CIRCUIT COURT CASE NO. 05C-1084, submitted APRIL 13,2005, BUT ON MAY 19, 2005, CLAIM WAS AMENDED TO ASSAULT AND BATTERY AS A CRIME/CIVIL INJURY.

ON JUNE 13,2005, A SIGNED ORDER BY 5th CIRCUIT COURT JUDGE WALTER KURTZ, GRANTING THE ORDER IN PART AND DENIED IN PART. DEFENDANT'S MOTION IS DENIED IN REFERNCE TO PLAINTIFF'S BATTERY/FALSE IMPRISONMENT AND FALSE ARREST

CLAIMS. PLAINTIFF'S COMPLAINT FAILS TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED IN REGARD TO ALL OTHER CLAIMS, AND THOSE CLAIMS ARE THEREFORE DISMISSED PURSUANT TO TENN. R. CIV. P. 12.02(6). PURSUANT TO THIS DISMISSAL, ALL CLAIMS OTHER THAN BATTERY AND FALSE ARREST/IMPRISONMENT ARE NOT TO BE LITIGATED IN THIS ACTION.

SOON AFTERWARD DEFENDANT'S ATTORNEY MAILED ME A REQUEST FOR TRIAL WHICH WAS HELD AUG. 1, 2005 BY PROBATE JUDGE OF THE 7th CIRCUIT COURT, JUDGE DAVID RANDALL KENNEDY,SR., WHO SIGNED AN FINAL JUDGMENT ORDERED, ADJUDGED, AND DECREED THAT PLAINTIFF'S CLAIMS AGAINST DEFENDANT, SETON CORPORATION d/b/a BAPTIST HOSPITAL, ARE HEREBY DISMISSED IN THEIR ENTIRETY, WITH PREJUDICE, AND A FINAL JUDGMENT IS ENTERED IN FAVOR OF DEFENDANT .

WHEN THE PLAINTIFF SEEK TO ESTABLISH MUNICIPAL LIABILITY, THE PLAINTIFF MUST SATISFY A FIFTH ELEMENT, NAMELY, THAT THE VILATION OF PLAINTIFF'S FEDERAL RIGHT WAS ATTRIBUTABLE TO ENFORCEMENT OF A MUNICIPAL POLICY OR PRACTICE. THE PLAINTIFF BEARS THE BURDEN OF ESTABLISHING EACH ELEMENT OF THE CLAIM FOR RELIEF BY A PREPONDERANCE OF THE EVIDENCE. VALANCE Vs. WISEL, 110 F.3d 1269 (7th CIR. 1997); RUGGIERO Vs. KRZEMINSKI, 928 F.2d 558 (2d CIR. 1991); SHAW Vs. LEATHERBERRY, 706 N.W.2d 299 (WIS. 2005). SEE ALSO HARTMAN Vs. MOORE, 126 S. CT. 1695 (2006) (BIVENS ACTION); 4 SCHWARTZ AND PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS 3.03 (ASPEN 2000). SEE ALSO TATRO Vs. KERVIN, 41 F.3d 9 (1st CIR.1994).

STATE COURTS ARE BOUND TO RECOGNIZE THE JUDGMENTS OF THE

FEDERAL COURTS. SEE STOLL Vs. GOTTLIEB, 305 U.S. 165, 170-171, 59 S. CT. 134, 83 L. Ed. 104, 108 (1938); PANSY Vs. BOROUGH OF STROUDSBURY, 23 F.3d 772, 784 n.13 (3d CIR. 1994).

BOTH STATE AND FEDERAL COURTS MUST APPLY FEDERAL LAW TO DETERMINE WHETHER JUDGMENTS IN FEDERAL-QUESTION CASES ARE ENTITLED TO RECOGNITION. SEE WILLIAMS Vs. OCEAN TRANSP. LINES, INC., 425 F.2d 1189 (3d CIR. 1970).

" THE APPEALS COURT FOR THE 6th CIRCUIT"
UPHOLD THE INJUNCTION:
CASE NO. 06-6307

THE COURT OF APPEALS HELD THAT AN INJUNCTION WAS APPROPRIATE BECAUSE ALTHEIMER HAD ESTABLISHED IRREPARABLE HARM AND HAD NO ADEQUATE REMEDY AT LAW. THE 6th CIRCUIT FOUND NO JURISDICTIONAL DEFECT IN ALTHEIMER'S ACTION. "A REVIEW OF THE RECORD INDICATES THAT THE INSTANT CASE PRESENTS A REAL CONTROVERSY BETWEEN THE PARTIES AND IS RIPE FOR JUDICIAL RESOLUTION AND HAS A DIREST IMMEDIATE IMPACT ON THE PARTIES"

NOTING THAT ALTHEIMER ATTEMTED INTERVENTION IN DISTRICT COURT, THE 6th CIRCUIT COURT OF APPEALS UNDERSTOOD THE LONG-HELD PRINCIPLE THAT ALTHEIMER COULD NOT BE BOUND BY A DECISION OBSERVED: "IT APPEARS THAT THE DISTRICT COURT ANTICIPATED, OR RATHER, REQUIRED OTHER ENTITIES TO THEIR IN COURT ELSEWHERE.

UPON REVIEW, WE CONCLUDE THAT THE DISTRICT COURT PROPERLY DISMISSED ALTHEIMER'S COMPLAINT FOR FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED. ONE-YEAR STATUTE OF LIMITATIONS AND FINALLY, 1983 civil RIGHT COMPLAINT IS BARRED BY THE DOCTRINE OF RES JUDICATE/AFFIRM THE DISTRICT COURT ORDER FILED FEB 14, 2008.

FEDERAL RULE OF CIVIL PROCEDURE 12(B)(6) PROVIDES THE BASIS FOR DISMISSING AN ACTION FOR "FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED". SOME CASES, ESPECIALLY THOSE DECIDED BEFORE THE ADOPTION OF THE FEDERAL RULES, HELD THAT A DISMISSAL FOR INSUFFICIENT PLEADING WAS NOT ON THE MERITS. IT WAS THOUGHT TOO HARSH A REMEDY TO PRECLUDE A PARTY WITH A POSSIBLY MERITORIOUS CLAIM FROM PURSUING A SECOND ACTION SIMPLY BECAUSE OF FAILURE TO MEET SOME TECHICAL PLEADING REQUIREMENT. SEE GOULD Vs. EVANSVILL AND C. R.R. CO., 91 U.S. 526, 533-534, 23 L. Ed 416 (1875). THIS RATIONALE WAS WEAKENED CONSIDERABLY BY THE PASSAGE OF THE FEDERAL RULES OF CIVIL PROCEDURE, WITH THEIR LIBERALIZED PLEADING REQUIREMENTS AND RIGHT OF AMENDMENT.

SUCH AS LIMITATION PERIOD OR SURVIVORSHIP RULE, IN FELDER Vs. CASEY, 487 U.S. 131, 140 (1988), THE SUPREME COURT RULED THAT NOTICE-OF-CLAIM RULES DO NOT FALL INTO THIS CATEGORY.

REASONS FOR GRANTING A REHEARING:

HOWEVER, THE DEFENDANT MAY SOMETIMES PREVAIL BECAUSE THE COURT DETERMINES THAT IT HAS NO SUBJECT MATTER JURISDICTION, OF DEFENDANTS OR OF INDISPENSABLE PARTIES IS LACKING, THAT VENUE IS IMPROPER, OR THAT PLAINTIFF HAS FAILED TO COMPLY WITH SOME PREREQUISITE TO FILING SUIT, SUCH AS EXHAUSTION OF ADMINISTRATIVE REMEDIES. IN SUCH CASES, THE RESULTING JUDGMENT OF DISMISSAL IS NOT DETERMINATION OF THE CLAIM, BUT RATHER A REFUSAL TO HEAR IT, AND THE PLAINTIFF MAY THERE AFTER PURSUE IT IN AN APPROPRIATE FORUM OR WHEN THE PRECONDITIONS HAVE BEEN MET. REFUSAL TO HEAR CLAIM. FED. R. CIV.

P. 41 (b); SEE COSTELLO Vs. UNITED STATES, 365 U.S. 265, 285, 81 S. CT. 534, 5 L. Ed. 2d 551 (1961) (DISMISSAL FOR FAILURE TO SATISFY PREREQUISITE TO DETERMINATION OF MATTER ON MERIT WAS TO BE CONSIDERED AS DISMISSAL FOR LACK OF JURISDICTION UNDER FED. R. CIV. P. 41 (b).

WHEN THE PLAINTIFF SEEKS TO ESTABLISH MUNICIPAL LIABILITY, THE PLAINTIFF MUST SATISFY A FIFTH ELEMENT, NAMELY, THAT THE VIOLATION OF PLAINTIFF'S FEDERAL RIGHT WAS ATTRIBUTABLE TO ENFORCEMENT OF A MUNICIPAL POLICY OR ESTABLISHING EACH ELEMENT OF THE CLAIM FOR RELIEF BY A PREPONDERANCE OF THE EVIDENCE. VALANCE Vs. WISEL, 110 F. 3d 1269 (7th CIR. 1997); RUGGIERO Vs. KRZEMINSKI, 928 F. 2d 558 (2d CIR. 1991); SHAW Vs. LEATHERBERRY, 706 N. W. 2d 299 (WIS. 2005). SEE ALSO HARTMAN Vs. MOORE, 126 S. CT. 1695 (2006) (BIVENS ACTION); 4 SCHWARTZ AND PRATT, SECTION 1983 LITIGATION: JURY INSTRUCTIONS 3.03 (ASPEN 2000). SEE ALSO TATRO Vs. KERVIN, 41 F. 3d 9 (1st CIR. 1994).

THE REPORT AND RECOMMENDATION SUBMITTED BY MAGISTRATE JUDGE JOE B. BROWN TO U.S. DISTRICT JUDGE TODD CAMPBELL, INDICATES THAT 5th CIR. COURT JUDGE WALTER KURTZ CASE NO. 05C-1084 SIGNED THE FINAL JUDGMENT. (BIG ERR) JUDGE DAVID RANDALL KENNEDY,SR., SIGNED THAT ORDER. MAKE SO BAD A PROBATE JUDGE OF THE 7th CIR. COURT.

ALSO, ANOTHER ERR. THE 1981, 1982 1983 CLAIMS WERE NOT RAISED IN CIRCUIT COURT. ON MAY 19, 2005, MY COMPLAINT WAS AMENDED TO ASSAULT/BATTERY AS A CRIME/CIVIL INJURY.

CONSTITUTIONAL LAW/ CIVIL RIGHT ENFORCEMENT/ CIVIL RIGHTS ACT OF 1871/ COVERAGE:

A DUTY TO PROTECT CAN ARISE IN A NON-CUSTODIAL SETTING IF THE STATE DOES ANYTHING TO RENDER AN INDIVIDUAL MORE VULNERABLE TO DANGER.

A DUTY TO PROTECT A CITIZEN MAY ARISE IF THE STATE HAS A SPECIAL RELATIONSHIP WITH A PERSON, SUCH AS WHEN IT TAKES A PERSON INTO CUSTODY. OUTSIDE OF THE CUSTODIAL SETTING, POLICE ACTIONS MAY GIVE RISE TO A SPECIAL RELATIONSHIP WITH A CRIMINAL OR A VICTIM THAT CAN CREATE 42 U.S.C.S. 1983 LIABILITY.

CONSTITUTIONAL LAW/ EQUAL PROTECTION/ SCOPE OF PROTECTION:

THE STATUS OF BEING AN ALCOHOLIC, OR A RECOVERING ALCOHOLIC, IS NOT A SUSPECT CLASS FOR EQUAL PROTECTION ANALYSIS, AND SO THE LOWEST LEVEL OF SCRUTINY APPLIES TO THE DEFENDANTS' ACTION.

THE DEFENDANT'S WITNESS LIST IS (CREDIBILITY EVIDENCE) OF A LIAR. THIS ACT OF JUSTICE VIOLATES THE 14th AMENDMENT IS ENOUGH TO DEMONSTRATE AN EQUAL PROTECTION VIOLATION. SHULTZ-Vs. HEYISON, D PA. 1975, 439 F. SUPP. 857.

CONCLUSION:

1) IF A FEDERAL RULE EXISTS, IT SHOULD APPLY, AND THERE IS NO JUSTIFICATION FOR APPLYING STATE LAW. WILSON Vs. GARCIA, 491 U.S. 261, 267 (1985).

2) IF I HAD MY WAY! I WILL TELL YOU WHAT TO DO.

3) I WAS OFFICIAL CHOP AND SCREWED, AND I HOPE ON THE MERCY OF THIS COURT WITH THEE HIGHEST AUTHORITY GRANT THIS REHEARING.